Supreme Court of the United States

OCTOBER TERM, 1951—No. 522

JOSEPH BURSTYN, INC.,

Appellant,

against

LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*

BRIEF FOR APPELLANT

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Opinions Below

The majority, concurring and dissenting opinions in the Court of Appeals of the State of New York appear at R 144 and are reported at 303 N. Y. 242.

The opinion in the Appellate Division of the State of New York appears at R 88, and is reported at 278 App. Div. 253.

Jurisdiction

The Jurisdiction of this Court is conferred by Section 1257(2) of Title 28 of the United States Code.

The judgment of the Court of Appeals of the State of New York was entered October 18, 1951. Application for appeal to this Court was made December 4, 1951. This Court noted probable jurisdiction February 4, 1952.

The Statutes Involved

N. Y. Education Law § 129 and Regents' Rules § 242 make it unlawful to exhibit motion pictures in a public theater unless the pictures are licensed. Violation of the provision is a penal offense (Education Law § 131). The required licenses are issued by the Motion Picture Division, a subdivision of the State Education Department (Education Law §§ 120, 122; Regents' Rules § 237). The Education Department is governed by the Regents of the University of the State of New York, and the Commissioner of Education (Education Law § 101).

Before a license is issued for a film, it must be reviewed by the Director or other officer of the Motion Picture Division. The reviewers are empowered and directed to deny a license to any film found "obscene, indecent, immoral, inhuman, sacrilegious, or * * * of such a character that its exhibition would tend to corrupt morals or incite to crime." (Education Law § 122; Regents' Rules § 244.)

Permits are issued without prior examination for motion pictures intended solely for religious, scientific or educational purposes (Education Law § 123(3)). Such permits are revocable by the Director of the Division (Education Law § 125), and may not be issued to any film found "obscene, indecent, immoral, sacrilegious," etc. (Regulations § 244).

The statues and pertinent parts of the Regulations are set out in the Appendix.

Statement of the Case

The subject of this appeal is the New York ban of the motion picture "The Miracle." Appellant, a distributor of moving pictures (hereafter referred to as the Distributor) owns the American rights to the film (R 3, 4). The Appellees, the Commissioner of Education and the Regents

of the University of the State of New York, (hereafter referred to as the Regents) banned the picture by revoking the licenses required by law for its exhibition.

The licenses had been issued by the state film censorship board, the Motion Picture Division. The Motion Picture Division is an agency of the Education Department and the Regents assumed the authority to cancel the licenses as the governors of the Education Department. (See preceding statement of the Statutes Involved.)

Two licenses were issued for "The Miracle." The first was issued to Lopert Films, Inc., in March, 1949 (R 4, 42). The second license was issued, in November, 1950, to the Distributor, who purchased the rights to "The Miracle" from Lopert (R. 4). The second license also covered two other films that had been combined with "The Miracle" under the title "Ways of Love."

"Ways of Love" was first shown in New York City on December 12, 1950. It was an immediate success (R 5, 13). The newspapers and magazine reviews were laudatory. The film was approved and recommended by the National Board of Review of Motion Pictures[1] as a feature especially worth seeing (R 44, 96), and on December 27, 1950, it was voted the best foreign language film of the year by the New York Film Critics (R 5, 44).

A print of "The Miracle" is made part of the record on appeal and is available for the Court's examination. It is, in brief, the story of a simple minded, deeply religious woman who is made pregnant by a stranger she

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[1] The National Board of Review is an independent, non-profit organization formed to promote the development of motion pictures. The Board reviews and classifies motion pictures for subscribing communities, women's clubs, schools, libraries, parent-teacher associations, etc. (R. 44). Censorship of Motion Pictures, 49 Yale L. J. 87, 109; Theodore Kadin, Administrative Censorship, 19 Boston U. L. R. 533, 559; Motion Pictures and the First Amendment, 60 Yale L. J. 696, 714, fn. 40.

believes to be St. Joseph. When the woman learns she is with child, she imagines it was conceived without sin. The picture ends when the child is born (R. 43). It is a short film with few incidents. The emphasis in the direction is not on the story but on the portrayal of the principal character. There is nothing in the dialogue or action in the picture that would suggest that it is to be given any other than a literal meaning.

Shortly after the first showing of "The Miracle," the Legion of Decency, a Roman Catholic censorship board,[2] condemned the picture as irreligious (R 45) and the Education Department received a number of letters protesting against the exhibition of the film (R 49). The letters obviously were inspired by the Legion or its supporters. It was conceded by counsel for the Regents, on the argument in the New York Court of Appeals, that a large number of those who wrote letters condemning the picture probably had not seen it, for the letters were sent from areas where the picture had not been shown.

The Regents, after they received the letters, determined to inquire into the matter. They appointed three of their number as a committee to review the picture (R 49). The committee saw the picture, found it sacrilegious (R 25-26), and was then reappointed to conduct a hearing on the question of whether the film was sacrilegious, and on the legal question of the Regents' power to revoke a license (R 30).*

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[2] Ruth A. Inglis, Freedom of the Movies, page 121.

* There was no specific statutory authority for revocation in the absence of abuse of a license, and in the 24 years that the Motion Picture Division had been under their jurisdiction the Regents never revoked or attempted to revoke a license where there was no claim of abuse (R 14, 58). (See also R 161-163.)

The Distributor requested the committee to disqualify itself on the ground that it had prejudged the issue (R 33). The request was refused (R 33) and the committee, confining its determination to the legal question, found that the Regents had "the power of censorship of motion pictures", and the authority to rescind licenses (R 54). Thereafter the Regents issued an order cancelling the licenses for "The Miracle" on the ground that it was a sacrilegious mockery of the Divine Birth of Jesus (R 54-56).

The Regents went to great lengths to support their decision. To prove the film was intended to ridicule the Divine Birth, the Regents alleged that its principal characters were clothed in a manner calculated to suggest Saint Joseph and the Virgin Mary. They described "the costume of 'the stranger' in the picture as similar to the traditional images of the Saint * * * (with) garments such as were used in the Holy Land in the time of Christ" (R 19). They described the woman as "dressed in clothes caricaturing those worn in church processions honoring the Virgin Mary" (R 19). Prints made from the film reveal that the stranger's garments consist of a U. S. Army (World War II) field jacket, U. S. Army olive-drab trousers, a U. S. Army fatigue cap, and U. S. government issue shoes. The woman was, in the scene referred to, dressed in a cotton house dress, and a woolen plaid shawl.

Though the Regents were unanimous in their opinion that "The Miracle" is sacrilegious, the weight of considered Christian opinion is to the contrary. The film was produced in Italy and was approved for exhibition by the Italian ministry (Exhibit 1, R 46). That approval is significant in view of the Lateran agreement requiring the suppression of whatever "may offend the Catholic religion" (Exhibit 2, R 47). The writer of the script, the producer and the director of the film, and the professional cast are all devout Roman Catholics and ob-

viously did not intend to commit sacrilege (R 43). The review of the picture in the Vatican newspaper L'Osservatore Romano made no criticism on religious grounds (Exhibit 4, R 96, 44). The film was passed without objection by the Vatican representatives at the Venice Film Festival (Exhibit 3, R 48, 44). And no objection to the film was made by the United States Customs when it was brought to America (R 44).

When the first license for the film was issued by the New York Motion Picture Division in February, 1949, Ward C. Bowen was then its director (R 42). The grant of a license was an affirmative determination by the administrative body charged with enforcement of the law that "the picture is not obscene, indecent, immoral, inhuman, sacrilegious * * *"[3] The Distributor relied on that determination when he purchased the film. Dr. Hugh Flick was Director when the second license was issued in 1950 (R 43). After the Legion of Decency protested against the showing of "The Miracle", Dr. Flick re-examined the film and determined again that it had been properly licensed (R 5, 43). A number of ministers and theologians—Congregationalists, Presbyterians, Episcopalians, Unitarians and members of the Evangelical and Reformed Church who saw the film in The Community Church in Boston (Exhibit 16, R 128) and in the Union and Princeton Theological Seminaries— found that the film was not sacrilegious (Exhibits 5-78, R 96-144). Indeed, all Protestant clergymen who expressed themselves publicly, were of that opinion (R 45, 166). Many found the picture pious and reverent (R 44; Exhibit 9, R 124; Exhibit 10, R 98). There is considerable Roman Catholic opinion in the United States to the same effect (R 45; Exhibits 53-A, R 137;

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[3] *United Artists* v. *Amity Amusement Corp.*, 188 Misc. Rep. 146, 147 (N. Y. Supreme Court).

Exhibit 54, R 108; Exhibit 62, R 110).[4] Two American Catholic publications, The Catholic Messenger (a diocesan paper),[5] and The Commonweal,[6] protested against the suppression of "The Miracle." Eminent authors, playwrights, educators, editors, publishers, radio commentators, curators of museums, artists, poets, business executives, and economists, of the Roman Catholic, Protestant and Jewish faiths, also indicated that they do not consider the film sacrilegious; and film critics of diverse faiths found "The Miracle" a devout and pious film (R 44). The picture was rejected by the purchasing agent for Communist controlled countries as "*pro*-Catholic propaganda" (R. 45).

Immediately after the licenses for The Miracle were cancelled, the Distributor instituted proceedings to review the determination of the Regents and to enjoin the enforcement of the censorship law (R 3-8). The proceedings were heard by the Appellate Division of the Supreme Court (3rd Department) of the State of New York (R 60). The Appellate Division confirmed the determination of the Regents (R 87). An appeal was taken to the Court of

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[4] Otto Spaeth, a distinguished Catholic layman, an official delegate to the First International Congress of Catholic Artists, and past president of the Liturgical Arts Society, wrote:

> "At the outbreak of the controversy, I immediately arranged for a private showing of the film. I invited a group of Catholics, competent and respected for their writings on both religious and cultural subjects. The essential approval of the film was unanimous.
>
> "There was indeed 'blasphemy' in the picture but it was the blasphemy of the villagers, who stopped at nothing, not even the mock singing of a hymn to the Virgin, in their brutal badgering of the tragic woman. The scathing indictment of their evil behavior, implicit in the film, was seemingly overlooked by its critics" (Exhibit 54).

[5] Issue of March 22, 1951, at page 4.

[6] March 2, 1951, page 507, March 16, 1951, page 567. See also R 160 (dissenting opinion of Judge Fuld).

Appeals, the New York State court of last resort. The Court of Appeals (with two Judges dissenting) affirmed the judgment of the Appellate Division (R 142).

Specification of Errors

The respects in which the Court of Appeals of the State of New York erred are set forth in the Assignment of Errors (R 173). The specifications in substance charge that the court erred:

1. In sustaining the Regents' determination that "The Miracle" is sacrilegious.

2. In holding that the New York film censorship laws do not impose an unconstitutional restraint on freedom of expression and communication.

3. In holding that the meaning of the law is clear and definite and its enforcement did not deprive appellant of its rights and property without due process of law.

4. In holding that the censorship law as construed does not violate the constitutional guaranty of separate church and state.

5. In holding that the law as applied did not inhibit the free exercise of religion.

Summary of Argument

1. We are here challenging the validity of the New York motion picture censorship laws. The statutes provide for inspection and licensing of films before they can be shown in a public theater. Presentation of a film without a license is a penal offense. Motion pictures are a means of communication within the protection of the amendments guaranteeing freedom of the press; the purported authority to the contrary is outdated and has in effect been over-

ruled. The statutes, in requiring permission from a government agency before a communication may be published, impose an unconstitutional restraint on the liberty of the press.

II. The statutes provide that a film shall be denied a license (*i.e.*, shall not be shown publicly) if *sacrilegious*. The word "sacrilegious" is not defined in the statute or in any regulation. It is so vague and indefinite, capable of so many interpretations, that the administrators of the law may apply it as they will in any given case. An adverse decision by the administrators results in the loss of substantial rights: the right of expression by means of talking-pictures, and the right to exhibit a film for profit. Since the vagueness of the law permits arbitrary application, one may be deprived of rights without "due process" of law. The statutes are, therefore, repugnant to the Fourteenth Amendment.

III. The statutes, in directing the censors to determine whether or not a film is sacrilegious, require them to make a religious judgment—and that judgment is the basis for official action. Nothing may be held sacrilegious unless judged according to a particular religious doctrine. The government sanction of religious dogma violates the constitutional fiat that church and state shall be separate.

IV. "The Miracle" was banned because, it was alleged to be a "visual caricature of religious beliefs held sacred." Caricature is an expression of disapproval or disagreement. The Constitutional guaranty of the free exercise of religion extends to the profession of religious disbelief and dissent. The freedom to express disbelief is not limited to any particular form or method or medium. An expression of disbelief may not be suppressed because it offends the sensibilities, or insults the cherished doctrine, of any religious group. If "The Miracle" did in fact ridicule religious doctrine, the suppression of the film on that ground was an unlawful interference with appellant's right of religious dissent.

Argument

POINT I

The New York film censorship law imposes an unconstitutional restraint on freedom of expression.

Precis

Motion pictures are a medium of expression and communication. As such they are entitled to the privileges, immunities and freedom guaranteed the press by the Constitution. The statutes under consideration provide for censorship and licensing of communications prior to their distribution or publication. The main purpose of the amendments prohibiting interference with the press is to prevent the imposing of restraints before publication.

We are not here concerned with punishment after distribution or exhibition, and it is not urged that exhibitors, distributors or producers of films should be free from responsibility for abuse of their constitutional rights. It is, on the contrary, urged that subsequent punishment for abuse is the appropriate remedy, and the only remedy consistent with the constitutional provisions guaranteeing liberty of the press.

There is no warrant for the exclusion of movies from the protection of the Constitution. Those who advocate censorship claim the power and influence of movies present a danger that can be met only by regulation prior to exhibition. The plain fact is that no such danger exists. Relying on *Mutual Film Corp.* v. *Ohio Industrial Comm.*, 236 U. S. 230 (1915) the majority in the Court below held that motion pictures "are primarily a form of entertainment, a spectacle or show, and not such vehicles of thought as to bring them within the press of the country" (R 156). The *Mutual Film* case has been all but explicitly overruled, and may no longer be considered controlling authority.

Motion pictures are a medium of communication within the protection of the First and Fourteenth Amendments

The freedom of the press guaranteed by the Constitution is not limited to the printed word. It extends to motion pictures and all other published media by which ideas are expressed and disseminated. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion" (*Lovell* v. *City of Griffin*, 303 U. S. 444, 452).

Static pictures in comic strips[7] and recorded voices[8] have been separately recognized as vehicles for the communication of ideas, entitled as such to the protection of the First and Fourteenth Amendments. Talking moving pictures are not in a different category because they project visual images and recorded voices. As Judge Fuld wrote in his dissenting opinion in the court below:

> "A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the 'airborne voice,' the printed word of the 'still' picture, it is put forward by a 'moving' picture. The First Amendment does not ask whether the medium is visual, accoustic, electronic or some yet unheard-of device. It has readily accommodated itself to other products of inventive genius, to other advances in technology, such as the radio and television. If 'The Constitution deals with substance, not shadows,' if 'Its inhibition was levelled at the thing, not the name' (Cummings v. Missouri, 4 Wall. 277, 325), then surely, its meaning and vitality are not to be conditioned upon the mechanism involved" (R 169).

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[7] *Winters* v. *New York*, 333 U. S. 507.

[8] *Cantwell* v. *Connecticut*, 310 U. S. 296, 301.

We are unable to follow the rationale of a decision that will recognize the comic strip as a vehicle of thought but will deny that recognition to motion pictures; that will concede the right of free press to a novel but will deny the right to a movie version of the same story[9]; that will deny the protection of the First Amendment to a moving picture, but extend that protection to still prints of the same film in a magazine.[10]

Three of the seven judges of the court below recognized motion pictures to be a medium of communication entitled to the liberty of the press. Judge Desmond, though he concurred with the majority in the Court of Appeals, agreed with Judges Fuld and Dye that "Motion pictures are * * * not excluded from First Amendment coverage (*United States* v. *Paramount Pictures*, 334 U. S. 131, 166)." The reference to *United States* v. *Paramount, supra*, is to the frequently quoted dictum of Mr. Justice Douglas, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." See also Mr. Justice Black's dissent in *Kovacs* v. *Cooper*, 336 U. S. 77, 102 in which he said, "Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, *moving pictures* and public address systems * * * The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition" (Emphasis ours).

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[9] See "Books Into Films," a weekly column in Publishers' Weekly, listing books purchased for translation into movies.

[10] Photographs from The Miracle and a summary of the story appeared in Life Magazine (Exhibit 4). Cf. *Matter of American Committee on Maternal Welfare* v. *Mangan*, 257 App. Div. 570, and *People* v. *Larsen*, 5 N. Y. S. 2d 55.

Today movies perform the same functions as other media of the press. News-reels report current news, as do the daily papers.[11] Current films editorialize; they consider and comment on such social and political problems as the position of the negroes in the South,[12] anti-semitism,[13] the dangers of demagoguery,[14] juvenile delinquency,[15] the commercialism and corruption of college athletics,[16] the ruthlessness of yellow journalism,[17] the disabled veteran,[18] labor-management relations,[19] mob emotions,[20] the Klu Klux Klan,[21] alcoholism,[22] psychoanalysis,[23] the lack of proper facilities for treatment of mental illness,[24] communism,[25] nazism,[26] the degradation and corruption brought by war,[27] the brotherhood of nations,[28] euthanasia,[29] the problems of displaced persons,[30] the false worship of material success,[31] etc.

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[11] Under New York Education Law § 123(1), news-reels may be shown without license or permit.

[12] Pinky; Intruder in the Dust.

[13] Crossfire; Gentlemen's Agreement.

[14] All the King's Men.

[15] City Across the River; Bad Boy; Knock on Any Door.

[16] Saturday's Hero.

[17] Scandal Sheet; The Big Carnival.

[18] The Men; Bright Victory.

[19] Whistle At Eaton Falls; With These Hands.

[20] The Lawless; The Well.

[21] Storm-Warning; The Burning Cross.

[22] Lost Week-End.

[23] The Dark Past.

[24] Snake Pit.

[25] The Iron Curtain.

[26] Tomorrow the World.

[27] Three Came Home; Battleground.

[28] Berlin Express.

[29] Live Today for Tomorrow.

[30] The Search; Long Is the Road.

[31] Death of a Salesman.

Documentary films have the same unlimited range and scope as the non-fiction book. They inform about regional customs and mores,[32] promote reforms,[33] explain events,[34] record history,[35] and teach principals and processes.[36] The Federal Government has given official recognition to motion pictures as a means of disseminating information and ideas.[37] Government agencies have produced and distributed documentaries on virtually every subject from *Aeronautics* to *Zinc*. The U. S. Government Printing Office Bulletin 1951, No. 21, lists 3434 government films made for the purpose of informing and educating. The United Nations has also made extensive use of motion pictures to inform the world of its functions and purposes; and the United Nations Educational, Scientific and Cultural Organization has organized a communications program to increase understanding among the nations through films as well as through periodicals, books and the radio.[38]

Clearly motion pictures, like other forms of the press, express ideas and opinions, disseminate information, pro-

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[32] Nanook of the North; Louisiana Story; This is America (series).

[33] The River; The Quiet One.

[34] This is Korea; March of Time (series).

[35] Desert Victory; Dunkirk; Paris 1900.

[36] Principles of Dry Friction; Printing the Positive; Topsoil.

[37] The Defense Production Act of 1950 exempts "books, magazines, motion pictures, periodicals or newspapers" from price controls. 50 U.S.C. App. § 2102(e) iii.

The term "informational media" as used in The Economic Cooperation Administration Act includes "books, motion pictures and periodicals," 14 Fed. Reg. 3916. See also Motion Pictures and the First Amendment, 60 Yale Law Journal 696, 702 footnote 16.

[38] Everyman's United Nations, New York 1948, p. 150, and Report of the Commission on Technical Needs, Press, Film and Radio, 1949, UNESCO, Paris.

selytize and entertain. They are entitled to the same rights and the same protections as the other divisions of the press.[39] If they have not fully realized their potential as an educational and cultural medium, that is the consequence, not a justification, of censorship.

The statute creates a licensing system void on its face

The New York Censorship Law (Education Law § 122) provides for inspection and licensing of films before they can be exhibited. It authorizes the licensors to determine what may or may not be shown. Any state law that imposes supervision over the content of communications prior to publication or exhibition violates the constitutional guaranties of the First and Fourteenth Amendments. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249; *Schneider* v. *State*, 308 U. S. 147 163-164; *Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Largent* v. *Texas*, 318 U. S. 418, 422; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 114; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Kunz* v. *New York*, 340 U. S. 290, 294.

The constitutional provision guaranteeing freedom of the press was adopted to prevent censorship prior to pub-

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[39] The Commission on Freedom of the Press made as its first recommendation, after exhaustive studies of mass communications, "* * * that the constitutional guaranties of the freedom of the press be recognized as including the radio and motion pictures" (Zechariah Chafee, Jr., Government and Mass Communications (1947), v. 2, p. 801). See also Kupferman and O'Brien, Motion Picture Censorship, 36 Cornell L. Q. 273; Motion Pictures and the First Amendment, 60 Yale L. J. 696, 701-710; Censorship of Motion Pictures, 49 Yale L. J. 87; Zechariah Chafee, Free Speech in the United States (1941) 544-548; Theodore Kadin, Administrative Censorship, 19 Boston U. L. R. 533, 552.

lication and distribution,[40] and was directed primarily against the system of licensing communications. *Near* v. *Minnesota*, 283 U. S. 697, 713-716; *Lovell* v. *Griffin*, 303 U. S. 444, 451-452; *Patterson* v. *Colorado*, 205 U. S. 454, 462. Licensing publications was the means used by the established church in England of controlling the first printing presses. The first struggle for freedom of the press was therefore, directed against the licensing system. William H. Wickwar, The Struggle for the Freedom of the Press, pages 14-15; William E. Hocking, Freedom of the Press, page 3 *et seq.*[41] Mr. Chief Justice Hughes, in writing of an ordinance which required a permit for the distribution of literature, said (*Lovell* v. *City of Griffin*, 303 U. S. 444, 451-452):

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the

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[40] The Constitution of the Republic of Cuba (1940), Article 33 (Amos J. Peaslee, Constitution of Nations I, 532), the Political Constitution of the Republic of Chile (1925), Article 10:3 (Peaslee I, 414), the Constitution of the Republic of Guatemala (1945), Article 36 (Peaslee II, 77), the Constitution of the Republic of Haiti (1946), Article 21 (Peaslee II, 115), the Political Constitution of the Republic of Honduras (1936), Article 59 (Peaslee II, 140), the Constitution of the Oriental Republic of Uruguay (1934), Article 28 (Peaslee III, 393), the Constitution of Venezuela (1947), Article 37 (Peaslee III, 475), all modeled on the First Amendment to the Constitution of the United States, expressly prohibit "previous censorship." The Constitution of the Republic of Cuba protects expression "in writing or by any other graphic or oral means" and refers specifically to films.

[41] The first common law definition of the right of the press was a recognition of the illegality of any prohibition prior to publication; "but this (liberty of the press) constitutes in law no previous restraint upon publication * * *" 4 Blackstone's Commentaries, 151-152 (William D. Lewis, ed.).

> press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing'. And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson* v. *Colorado*, 205 U. S. 454, 462 • • •"

A licensing system reduces the constitutional right of free expression to a privilege, a privilege to be doled out by the licensing authority. It is far more repressive than a law penalizing improper communications after publication.[42] There are few limitations on the licensor's discretion or power of censorship. A determination made by the licensor will not be interfered with unless it is one "that no reasonable mind could reach" (R 152). It is

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[42] An illustration of the greater constraint imposed by a licensing statute is afforded by the cases involving "The Birth of a Baby." The picture was refused a license by the Regents of the State of New York. The court, upholding the Regents' denial of a license, noted that there was considerable difference of opinion with respect to the decency of the film, and concluded that the Regents' action was, therefore, not arbitrary or unreasonable. *Matter of American Committee on Maternal Welfare* v. *Mangan*, 257 App. Div. 570, 573, aff'd 283 N. Y. 551. Thereafter *Life Magazine* published a series of still pictures taken from the film, and its editor was charged with publishing indecent matter in violation of the Penal Law. The criminal court, in acquitting the editor, held that the difference of opinion with respect to the propriety of the pictures "demonstrates the necessity of avoiding arbitrary censorship by a court." *People* v. *Larsen*, 5 N. Y. S. 2d 55. The fact that there was reasonable opinion on both sides of the question thus sustained the administrative censorship by the licensors; but prevented prosecution under a penal statute punishing improper publication.

almost impossible to prove a determination to be entirely unreasonable when it is a matter of opinion.[43] Also there are no procedural safeguards under a state licensing system to insure a fair and unbiased hearing. In the instant case, the Distributor was not advised of the particulars of the charges made against "The Miracle" until the decision was rendered against it (R 58). The order initiating the proceedings to revoke the licenses for the picture provided that the hearing was "restricted to the submission of affidavits and oral arguments and a brief" (R 27). No opportunity for cross examination or challenging or answering any evidence was afforded. And the triers of the issues in the case had unanimously judged "The Miracle" sacrilegious before the date set for hearing (R 26, 30). Similar proceedings in a court of law would unquestionably have been declared a nullity.

Where censors are vested by statute with such broad powers and, as a practical matter, their decisions are final, it becomes largely a matter of chance whether their selec-

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[43] "On its face the statute (N. Y. Education Law) seemingly makes a reversal of the censors' action a not too difficult task. In practice it is well nigh impossible. The odds are heavily against getting a film shown in New York after the censors have spoken. The New York censor board has never been reversed in court, and only in a few instances was its (negative) action vetoed by the Department of Education on appeal. This results from the rule that the only question before the court on appeal is whether the censors have abused their discretion. As long as they have exercised honest discretion and not acted unreasonably or arbitrarily, the court must sustain the action even though it personally disagrees with what was done. Over and over again it is properly stated that courts cannot substitute their judgment for that of administrative officers. But because of the necessarily vague standards set out to guide the censors, there will almost always be some evidence to sustain their determination, and so their action is in effect not subject to judicial review at all." Film Censorship: An Administrative Analysis, 39 Columbia L. R. 1383, 1397-1398.

tions are judicious or not.[44] As Dr. Samuel Johnson said, "If nothing may be published but what civil authority shall have previously approved, power must always be the standard of truth."

The "Special Problems" presented by movies do not justify the restrictions imposed by the statute

We have been reminded that we may not rest on formula, and that technological developments with respect to the means of communication have created special problems. (*Kovacs* v. *Cooper,* 336 U. S. 77, 95-96). Whatever technical problems are presented by talking-pictures, they do not justify disregard of the doctrine that there may not be regulation of the content of communications before publication. *Kovacs* v. *Cooper,* 336 U. S. 77, 97; Elliot Richardson, Freedom of Expression and the Function of Courts 65 Harvard Law Rev. 1, pp. 20-21).

What are the special problems presented by motion pictures? The majority opinion of the New York Court of Appeals in this case suggests that, as movies exercise great influence on their audiences, the showing of uncensored films "may do incalculable harm and the State * * * may afford protection as broad as the danger" (R 147). That is hardly consistent with the contention that movies are merely spectacles or circuses which do not communicate ideas.[45] It is, moreover, based on the undemocratic

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[44] The decisions of the film censorship boards have in fact often been irrational and inconsistent. "If you could compare in parallel columns the cuts made by censors in the six states with censorship, you would find absurdity complete. What one board favors, another bans. Whole films prohibited in one state are licensed in another. The sum total of cuts in one film made by them all would in many cases leave almost nothing." What Shocked the Censors, published by National Council on Freedom from Censorship, page 15. See also Censorship of Motion Pictures, 49 Yale L. J. 87, 94-96, 98-100.

[45] "that the moving picture is a most effective medium for spreading ideas is, of course, no reason for refusing it protection. If only ineffectual expression is shielded by the Constitution, free speech becomes a fanciful myth." Judge Fuld in dissenting opinion below; R 171).

assumption that the people of the State are so morally weak that they will be corrupted by exposure to indecent or sacrilegious pictures; and that an administrative officer endowed with superior judgment (who will not himself be corrupted by continual exposure) is capable of determining what will, and what will not, be dangerous for the ordinary citizen to see. Whether or not it is sound the fundamental tenet of Democracy is that the people may be, and must be, trusted. Whatever the risk, it must be taken. That, to use VanWyck Brook's phrase, is "the American wager."

The conclusion that uncensored motion pictures present a danger to the public welfare and morality is contrary to fact. Only six states[46] and approximately fifty cities[47] have laws establishing motion picture censorship. The court may take judicial notice that the people of the several thousand cities in the other forty-two states have not been unredeemably corrupted by uncensored films. Even in states where only licensed movies may be exhibited in theaters, *un*licensed films can be seen over television *Allen B. Dumont Laboratories* v. *Carroll*, 184 Fed 2d 153, (3rd cir.). It cannot, therefore, be urged that the statutory system under consideration is a necessary or an appropriate means of meeting the alleged danger presented by unlicensed movies.[48]

No factual basis for the statement that unpurged films create a clear and present or probable danger to the public welfare has ever been presented. The mere apprehen-

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[46] Massachusetts, Kansas, Maryland, New York, Ohio, Pennsylvania and Virginia.

[47] International Motion Picture Almanac (1950-1951), pp. 725-727.

[48] "The limitation upon individual liberty must have appropriate relation to the safety of the state." Mr. Justice Roberts, in *Herndon* v. *Lowry*, 301 U. S. 242, 258.

sion of a danger does not justify suppression. To justify restraint of expression there must be something more than a fear of harm to society. It must be shown that the danger is imminent and sufficiently grave to override society's interest in and need of free expression. It has been so frequently iterated that it is almost a commonplace that the democratic process is dependent on unhampered communication, and only the most serious and substantial evil—such as the danger of overthrow of the government by force—will justify any broad interference with the freedom of the press. *Dennis* v. *United States*, 341 U. S. 494, 503, 508-510, 585-586; *Marsh* v. *Alabama*, 326 U. S. 501, 508-509; *Thomas* v. *Collins*, 323 U. S. 516, 529-530; *Bridges* v. *California*, 314 U. S. 252, 262; *Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Schneider* v. *State*, 308 U. S. 147, 161-162; *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Stromberg* v. *California*, 283 U. S. 359, 369; "The enactment of a statute," Mr. Justice Brandeis wrote in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 374, "cannot alone establish the facts which are essential to its validity." See also *United States* v. *Carolene Products*, 304 U. S. 144. Any contrary view would permit a state legislature to invest itself with emergency powers merely by reciting the existence of the emergency.

It is scarcely likely that the invalidation of the censorship laws will 'open the floodgates' to indecency, as the court below feared. The state laws punishing indecency and obscenity *after* publication, and the federal law prohibiting the importation and interstate transportation of "any obscene, lewd, lascivious, filthy * * * motion picture film" (18 U. S. C. 1462 (a)) are sufficient deterrents to those who would be 'purveyors of immorality.' The Production Code Administration of the Motion Picture Association of America and unofficial pressure groups such as the Legion of Decency, General Federation of Women's Clubs, Protestant Motion Picture Council, etc., may also

be relied upon to keep motion pictures "pure."[50] The real danger is that those who seek to purify the movies will leave them sterile.[51]

Certainly, periodicals if mis-used have as great, if not a greater, potential for harm as improper motion pictures.[52] Motion pictures can reach only a limited number of people simultaneously. It may be assumed that the penal laws will be enforced with reasonable speed after exhibition, to prevent injury to any large number of people from indecent or immoral movies. Many tabloids and picture magazines, on the other hand, are distributed simultaneously to several million readers. The harm that may be caused by the publication of immoral, indecent or sacrilegious matter in periodicals could not be seriously urged today as justification for licensing them. As Mr. Chief Justice Hughes wrote in *Near* v. *Minnesota*, 283 U. S. 697, 720:

> "The fact that the liberty of the press may be abused * * * does not make any the less necessary the immunity of the press from previous restraint * * *

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[50] Ernst & Lindey, The Censor Marches On, page 86, *et seq.* Motion Pictures and The First Amendment, 60 Yale L. J. 696, 713-714; Kupferman & O'Brien, Motion Picture Censorship, 36 Cornell L. Q. 273, 299-300; Censorship of Motion Pictures, 49 Yale L. J. 97, pages 105 *et seq.* Ruth A. Inglis, Freedom of the Movies (1947), pages 151-171. Frederic M. Thrasher "Education versus Censorship", The Journal of Educational Sociology, Jan., 1940, pages 285, 287, 289; Theodore Kadin, Administrative Censorship, 19 Boston U. L. R. 533, 559-560.

[51] Ernst & Lindey, The Censor Marches On, pages 75-114; Zechariah Chafee, Free Speech in the U. S. (1941), pages 540-548.

[52] "* * * they can debase and vulgarize mankind. They can endanger the peace of the world; they can do so accidentally, in a fit of absence of mind. They can play up, or down, the news and its significance, foster and feed emotions, create complacent fictions and blind spots, * * *" The Commission on Freedom of the Press, "A Free and Responsible Press," page 3.

> Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The rule applies with equal force to talking pictures.

Collateral to the claim of need for censorship because of the insidious influence of the movies, is their alleged "potentiality for evil * * * among the young"[53] (R 147). The potential evil effect of movies on children is of course, merely a matter of speculation. The objective studies on the subject have not led to any definite conclusion.[54] The need to protect the youth is the invariable argument of the censor's advocate. Even "Tom Sawyer" and "Huckleberry Finn" were said to corrupt the morals of children. *Commonwealth* v. *Gordon*, 66 Pa. D. & C. Rep. 101, 116. In any event, the fact that some films may not be suitable for children does not warrant the reduction, as Professor Chafee argues, of all motion picture films to the level of a 12 year old child. Instead, we might better order the motion picture houses to exclude youngsters from certain plays and thus let adults chew occasionally on artistic and intellectual nourishment too tough for milkteeth. Also we can rely on groups of parents and other unofficial bodies to classify films according to their suitability for various ages. Or we might even go back to *laissez-faire* and trust sensible parents to keep their chil-

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[53] See *Winters* v. *New York*, 333 U. S. 507, at page 510, indicating that the court was not persuaded by that argument.

[54] See Raymond Moley, Are We Movie-Made, page 33; Healy & Bronner, Delinquents and Criminals, page 181; Phyllis Blanchard, The Child and Society, pages 200-203. In *State* v. *Lerner*, 51 Oh. L. Abs. 321, 337-338, Judge Struble discusses a report of the American Youth Commission showing that most children receive their information or mis-information about sex from their contemporaries. Less than 1% were misled by the movies and an equal number in church.

dren at home from mature films." (Zechariah Chafee, Jr., Free Speech in the United States (1941) p. 543).

Statutes restricting expression, even where justified by an actual danger, must not be broader than is necessary to meet the evil. *Feiner* v. *New York*, 340 U. S. 315, 320; *Niemotko* v. *Maryland*, 340 U. S. 268, 271-272; *Winters* v. *New York*, 333 U. S. 507, 509; *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-8. If the anticipated evil is the improper influence on children, then the application of the statute must be limited to pictures shown to children.[55]

The concurring opinion in the court below suggests the existence of still another danger,—danger to the public peace (R 159). The prevention of disorder is not the standard for censorship provided by the statute, and certainly it was not the reason for the suppression of "The Miracle." The picture has been shown extensively in various cities in the United States (including Washington, D. C.) and Italy and the exhibition never caused a breach of the peace or public disturbance. Moreover the statute regulates the showing of films in theaters, that is, on private property (New York Education Law § 129). The audience is not subjected to the communication. It must seek it out and pay an admission charge for the privilege of seeing and hearing it. If the audience to a motion picture is aroused to disorder, the hostile reaction of the audience is illegal, not the communication. The disorder would arise from the audience's intolerance of the views expressed and the vehemence of its reactions; and the authorities, therefore, would be obliged to restrain the audience, not pro-

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[55] The classification of films for children has been tried successfully in England. Three types of certificates are given, a U, an A and an H. Any child can see a U (universally certificated) film. Children are not admitted to theaters showing an H film, and they may see A (adult) films when accompanied by a parent or guardian. Roger Manvell, Film, 163-164 (1950 Pelican Ed.).

hibit the picture.[56] *Kunz* v. *New York*, 340 U. S. 290, 294, 295; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Near* v. *Minnesota*, 283 U. S. 697, 721-722. If an utterance could be prohibited because it might arouse an audience on private property to violence, then, as John Stuart Mill noted, the least educated and most intemperate citizens would become the arbiters of permissible expression.[57] And as Chief Justice Hughes said, in *Near* v. *Minnesota*, 283 U. S. 697, 722, "The danger of violent reactions becomes greater with effective organization of defiant groups * * * and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words."

The Mutual Film case has in effect been overruled

The appellees rely chiefly on *Mutual Film Corporation* v. *Ohio Industrial Comm.*, 236 U. S. 230, to support their position that motion pictures are not a part of the press. In that case, which was decided in 1915, the court sustained the validity of an Ohio statute similar to the New York film censorship law. It did so on the ground

> "that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion" (p. 244).

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[56] It has been suggested that the intention of the communication is a factor to be weighed in determining whether the utterance should be punished or a hostile audience curbed. The Problem of the Hostile Audience, 49 Columbia L. R. 1118, 1123. The producers of "The Miracle" have not been and cannot be charged with malicious intent. As previously noted, its director, script-writer and entire cast are all devout Roman Catholics.

[57] John Stuart Mill, On Liberty (Macmillan, 1926) Chap. II.

It will be noted that the court concerned itself solely with the question of whether the statute violated the *Ohio* Constitution. It was not until 1925, ten years after the decision in the *Mutual Film* case, that the provisions of the First Amendment relating to free press were held applicable to State legislation. That doctrine was first enunciated in 1925 in *Gitlow* v. *New York*, 268 U.S. 652, 666. See also *Near* v. *Minnesota*, 283 U. S. 697, 723-724. The *Mutual Film* case cannot, therefore, be considered as authority for the proposition that motion pictures may be denied the protection of the First (and Fourteenth) Amendments of the United States Constitution.

The constitutional concepts of freedom of speech and press, and the nature of motion pictures, have changed so fundamentally since the *Mutual Film* case, that the decision of the court in that case can no longer be considered controlling. Kupferman & O'Brien, Motion Picture Censorship, 36 Cornell Law Quarterly 273, 288; Censorship of Motion Pictures, 49 Yale Law Journal 87, 113, Chafee, Free Speech in the United States (1941), page 544.

The rationale of the *Mutual Film* case was that motion pictures could not be considered an instrument for the publication of ideas because they were "a business pure and simple," mere "spectacles" intended primarily for entertainment. After the *Mutual Film* case was decided, this Court determined that commercial enterprises, if media of communication, and publications intended for entertainment, were entitled to the freedoms guaranteed the press.

In *Grosjean* v. *American Press Co.* (1936), 297 U. S. 233, the court rejected the contention that the right of free speech should be denied corporate enterprises engaged in business for profit. Thereafter in *Thomas* v. *Collins* (1945), 323 U. S. 516, Mr. Justice Rutledge said (p. 531), "And the rights of free speech and a free press are not confined to any field of human interest. The idea

is not sound therefore, that the First Amendment's safeguards are wholly inapplicable to business or economic activity."[58]

In *Hannegan* v. *Esquire, Inc.* (1946), 327 U. S. 146, 153, 158; and *Winters* v. *New York* (1948), 333 U. S. 507, this court also repudiated the proposition that the freedom of the press may be denied communications originated for the purposes of entertainment. In the *Winters* case, which involved the publication of comic books, Mr. Justice Reed wrote (p. 510):

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. *The line between the informing and the entertaining is too elusive for the protection of that basic right.* Everyone is familiar with instances of propaganda through fiction. *What is one man's amusement, teaches another's doctrine.* Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (Emphasis supplied.)

The impossibility of drawing a line between entertainment and the communication of ideas is best illustrated by the prevailing opinion in the court below. The court, after declaring "The Miracle" a spectacle that does not convey ideas, found that the film deprecated a religious doctrine.

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[58] "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." Mr. Justice Douglas in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111.

In *United States* v. *C. I. O.*, 335 U. S. 106, Mr. Justice Rutledge said, in his concurring opinion page 155, "The (First) Amendment did not make its protections turn on whether the hearer or reader pays, or can pay for the publication or the privilege of hearing the oral * * * pronouncement" (matter in parenthesis inserted); and see *Near* v. *Minnesota*, 283 U. S. 697, 720; *Associated Press* v. *United States*, 326 U. S. 1, 27-28 (concurring opinion of Mr. Justice Frankfurter).

The argument that movies are still mere spectacles that do not communicate ideas ignores the very significant changes that have occurred in the last 36 years. When the *Mutual Film* case was decided in 1915, the moving picture industry was in its infancy. That was the day of the nickelodeon, when most pictures were still in single reels (Terry Ramsaye, The Annals of the American Academy of Political & Social Science, Nov., 1947, pp. 4, 5). Motion pictures were, at that time, a trivial form of entertainment without significance. Through advances in techniques and subject matter, movies have become a potent influence on the culture and thinking of the civilized world.[60] See discussion, *infra*, at pages 13-14.

The *Mutual Film* case should, as Judge Fuld suggested, "be relegated to the history shelf"[61] (R 171). The reasoning underlying the opinion has been held erroneous, and the factual conditions on which the decision was predicated no longer exist. This case must be judged in the light of present circumstances and experience, and not in that of what once was said, nor in the light of conditions that may once have existed but no longer prevail. *United States* v. *Carolene Products*, 304 U. S. 144, 153; *Nashville C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415; *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 443; *Chasteiton Corp.* v. *Sinclair*, 264 U. S. 543, 548.

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[60] Eric Johnson, The Motion Picture as a Stimulus to Culture, Annals of The American Academy of Political & Social Science, Nov., 1947, 98; John E. Harley, World Wide Influences of the Cinema, pages 2-7.

[61] See also authorities referred to in footnote 39 *infra*, page 15.

POINT II

The statute under which "The Miracle" was suppressed is so vague that it is void on its face. The attempted enforcement of the statute deprived appellant of its rights and property without due process of law.

There cannot be "due process of law" unless the process is under law. It is an ancient maxim that where the law is uncertain, there is no law, *ubi jus incertum, ubi jus nullum.* That maxim applies to a statute, such as the one here challenged, which is so vague that men of common intelligence cannot know its meaning. *Connally* v. *General Construction, Co.,* 269 U. S. 385, 391; *Winters* v. *New York,* 333 U. S. 507, 518.

When a law is unclear, it does not furnish any guide or impose any standard upon those who must enforce it. As the administrators determine the boundaries of the law, and the extent of their powers under it, there is no guard against arbitrary enforcement. Also, since each administrator determines the meaning of the statute for himself, the application of the statute changes with the person of the administrator. The consequence is government not of law but by men. *Jordan* v. *DeGeorge,* 341 U. S. 223, 239-240; *Musser* v. *Utah,* 333 U. S. 95, 97; *Winters* v. *New York,* 333 U. S. 507, 515, 518; *United States* v. *Capital Traction Co.,* 34 App. D. C. 592, 596; Due Process Requirements of Definiteness in Statutes, 62 Harvard L. R. 77.

Another evil of vagueness in a statute is that those subject to the law cannot know what action is prohibited; they may be penalized for conduct they could not know was condemned. *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453; *Stromberg* v. *California,* 283 U. S. 359, 368; *Connally* v. *General Construction Co.,* 269 U. S. 385, 391-393.

Indefiniteness is most pernicious in statutes regulating speech, press or religion. The vagueness of such laws per-

mits interpretation that will interfere with the exercise of basic civil rights. Where the normal construction of a statute would permit interference with expression or religion, the statute will be held void on its face. *Winters* v. *New York*, 333 U. S. 507, 512; *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Stromberg* v. *California*, 283 U. S. 359, 369. Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harvard L. R. 1208.

The censorship law under consideration regulates a means of communication. The evil of the vagueness in the law was compounded by the construction of the court below permitting restraint of religious utterance. The law, in fact, as it was construed and applied in this case, affords an example of all the vices of indefinite statutes.

The meaning of the law is obscure

The statute in question provides that a film shall be denied a license (*i. e.*, shall not be shown in any theater in the state) if "obscene, indecent, immoral, inhuman, sacrilegious * * * or is of such a character that its exhibition would tend to corrupt morals or incite to crime."[62] (New York Education Law § 122, Regents' Rules § 242.) The Regents found "The Miracle" *sacrilegious* and rescinded its license on that ground (R 56). The word "sacrilegious" is not defined in the statute or in the regulations promulgated by the Regents.[63] No opinion has been found in any State or Federal report (other than the opinions in the instant case) in which the term is construed. The Court below adopted one of the dictionary definitions of sacrilege, *e. g.*, "the act of violating or profaning any*thing* sacred" (emphasis ours) (R 151).

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[62] With respect to the provision prohibiting films that "would tend to * * * incite to crime" see *Winters* v. *New York*, 333 U. S. 507, 519-520.

[63] See Regulations § 244, Appendix, page 54.

The definition adopted by the court (which fixed the meaning of the statute for the purposes of this case, *Winters* v. *New York,* 333 U. S. 507, 514) does not limit the application of the term. "It leaves open * * * the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can * * * adequately guard against." *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89. What is meant by "any*thing* sacred"? Are only tangible things included, such as icons, the Cross of Jesus, the Star of David, or does the term also embrace ideas, customs, ceremonies? As the court below found that sacred beliefs are within the purview of the statute, the question arises as to whether *all* religious beliefs held sacred are included. Does the law shield Polygamy, Snake-worship, Demonism, Suttee, Voodoo, I-Am-ism[24] Exorcism, Bibliomancy, and Literal-Fundamentalism, from ridicule? In the dissenting opinion in the court below, Judges Fuld and Dye also ask, "At what point, * * * (does) a questioning of particular religious dogma take on the aspect of 'sacrilege'? At what point does expression or portrayal of a doubt of some religious tenet become 'sacrilegious'?" (R 166). All of the questions with respect to the meaning and application of the provision are left for such solution as the individual administrators of the law may find.

The statute permits arbitrary interpretation and enforcement

The standard offered by the court below as a guide to those enforcing the statute has been held by this court to be so vague as to permit arbitrary interpretation. The majority opinion stated, "* * * the standard to be applied * * * is simply this: that no religion, as that word is understood by the ordinary reasonable person, shall be treated

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[24] *Ballard* v. *U. S.,* 329 U. S. 187.

with contempt, mockery, scorn and ridicule" (R 154). In *Kunz* v. *New York*, 340 U. S. 290, a New York City ordinance, which made it unlawful "to *ridicule or denounce* any form of religious belief," was held unconstitutional. Mr. Chief Justice Vinson, writing for the court in the *Kunz* case described the ordinance as vesting "restraining control over the right to speak on religious subjects in an administrative official, *where there are no appropriate standards to guide his action*" 340 U. S. 290, 295. (Emphasis supplied.) There is no substantive distinction between the statute under consideration, as construed by the court below, and the ordinance struck down in the *Kunz* case. See also *State* v. *Klapprott*, 127 N. J. L. 395 (cited with approval in *Winters* v. *New York*, 333 U. S. 507, 516), which held that a statute prohibiting incitement of "hatred, abuse, violence or hostility against any group of persons * * * by reason of race, color, religion" was unconstitutional because its language was so general as to permit unlawful interference with freedom of expression.

Judge Desmond, in his concurring opinion in the court below, noted that the courts have not found the word "obscene," too general for application (R 158-159); and concluded that the term "sacrilegious" ought not to present any difficulties. The learned Judge failed to consider that the word "obscene," though general, has been judicially interpreted while the word "sacrilegious" has not been. The meaning of "obscene" has been defined and limited by judicial opinion. By reference to the opinions the application of the term may be ascertained by those affected by the statutes and those enforcing it. *Winters* v. *New York*, 333 U. S. 515, 518; *Connally* v. *General Construction Co.*, 269 U. S. 383, 391. No such definition or authority was available to those seeking to learn the meaning of "sacrilegious" in the statute under consideration.

The interpretation and applications of the statute were inconsistent

A statute is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application * * *" *Winters* v. *New York*, 333 U. S. 507, 517-518; *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. The word sacrilegious, as interpreted by the New York Court of Appeals, is one about which men of common and of uncommon intelligence must necessarily differ. The Regents argued in the court below, "anything is only sacrilegious to those persons who hold the (profaned) concept sacred." (Matter in parenthesis inserted.) (R 167). Unless all the administrators of the law hold the same concepts sacred, there will inevitably be differences in the application of the term. "'In the very nature of things, what is 'sacrilegious,' will of necessity differ with the philosophy, the training, the education and the background of the particular censor of the moment, the determination whether a film is 'sacrilegious' or not, must necessarily rest in the undiscoverable recesses of the official's mind." (Judge Fuld in the dissenting opinion below, R 166.)

"The Miracle," it will be recalled, was licensed twice by the Motion Picture Division, the agency charged with enforcement of the statute. The Division was under new directorship when the second of the licenses was issued. The approval of the film was not the result of perfunctory examination; it was the considered and carefully re-considered decision of the administrative experts in the field. Despite the determination of the the Motion Picture Division, the Regents found the film sacrilegious, and argued in the court below that it was sacrilegious as a matter of law. The contradictory applications and inconsistent in-

terpretations of the statute[65] were not due to any incapacity or malfeasance of the administrators. They were the result of the ambiguity of the term applied. "Sacrilegious" like "heresy" is a word without moorings. It shifts and changes in meaning as it is used by persons with differing religious beliefs. As there is no general agreement with respect to the things that are sacred, there can not be agreement with respect to what constitutes sacrilege (*i. e.*, a profanation of sacred things according to the Regents' definition).

Appellant could not have known what the law prohibited

It is a fundamental principle of justice and fair play that one ought not to be punished for offending against a law unless a reasonable opportunity to avoid the offense is afforded. Obviously a thing cannot be avoided unless it is known, or there is at least a means of learning what it is. When a statute is ambiguous, those governed by it, cannot know what it means or predict the way it will be applied. If the wording of a statute is such that the accused could not have known in advance that his actions came within them, the conviction amounts to enactment of a new statute by the court and is a denial of due process. *Winters* v. *New York*, 333 U. S. 507, 515. The rule applies to civil, as well as criminal penalty and to statutes, such as the ones under consideration, which deprive one of prospective gain. *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239.

Certainly the Distributor in the instant case could not have known "The Miracle" violated the censorship law. He had only the bare language of the statute and of the regulations, which use the same terms, to guide

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[65] *Cf.* The Regents' pronouncement on the sacrilege in "The Miracle" (R 55) and the views set forth in the Exhibits (R 96-114).

him.[66] The word sacrilege, as defined in the standard dictionaries, relates to the desecration or stealing of a religious object.. The word is derived from the Latin *sacer* sacred, and *legere* to gather, pick up; *i. e.*, to pick up or steal sacred things. It is defined in Bouvier's Law dictionary (1928) as "The act of stealing, from the temples or churches dedicated to the worship of God, articles consecrated to divine uses * * * Also the alienation to laymen of property given to pious uses." In Ballentine's Law Dictionary (2nd edition) sacrilege is defined as, "The larceny of sacred things from a church." Even the dictionary definition adopted by the majority in the court below referred to the profanation of any*thing* sacred (R 151). The only judicial construction of the word "sacrilege" relates to the English statutory crime of breaking and entry into, and committing a felony in, a place of divine worship (7 & 8 Geo. IV, c 29 Sec. 10; 24 & 25 Vict. c 95 Sec. 1, 19).[67] As the legal and dictionary

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[66] The Regents' Regulations which should elucidate and clarify the statute, merely repeat its equivocal provisions. Section 244 of the Regulations states, "No motion picture shall be licensed * * * the whole or any part of which is * * * sacrilegious * * *" (Appendix p. 54). The standards of the law prescribed by the Regents reaffirm, "No motion picture will be licensed * * * which may be classified, or any part thereof, as * * * sacrilegious * * *" (Appendix p. 54). The "interpretations" recall W. H. Auden's lines,

> "Law, says the judge as he looks down his nose
> Speaking clearly and most severely,
> Law is as I've told you before,
> Law is as you know I suppose,
> Law is but let me explain it once more,
> Law is the Law."
>
> From *Law Like Love*, The Collected Poetry of W. H. Auden, p. 75.

[67] It is significant that the English crime of Sacrilege applies only to the breaking and entry into an edifice of the established church. Entry into and theft from a church of any dissenting religion is Burglary. (*Rex* v. *Nixon and Scroop*, 1836, 7 Car & P 442; *Rex* v. *Richardson*, 1834, 6 Car & P 335).

definitions of the word relate to physical acts and tangible objects, the Distributor could not have anticipated that the statute would be applied to an alleged attitude towards religious dogma.

When the Distributor purchased the picture, it had already been licensed, *i. e.*, certified as *not* sacrilegious. As there was no express provision of the statute authorizing cancellation of a license the Distributor had no reason to suspect that the determination of the Motion Picture Division was not final.[28] Under the circumstances, only a clairvoyant could have predicted that "The Miracle" would offend against the statute.

The statute authorized punishment of communications within the protection of the Constitution

Uncertainty as to the effect or application of a law must cause the greatest concern when the statute involves or regulates communication or religion. The very existence of the statute, apart from its improper enforcement in a given case, inhibits expression or the free exercise of religion. *Winters* v. *New York*, 333 U. S. 507, 509-10; *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Stromberg* v. *California*, 283 U. S. 359, 369.

> "The power of the licensor * * * is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See Near v. Minnesota, 283 U. S. 697, 713. * * * The existence of

[28] See *Kunz* v. *New York*, 340 U. S. 290, 292, in which this Court questioned the propriety of revoking a permit where the ordinance regulating the issuance of permits does not specifically confer the power of revocation.

such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Mr. Justice Murphy in *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98."

The law as it was construed by the court below would permit the suppression of a number of perfectly proper and creditable films. The New York Court of Appeals, it will be recalled, held that the ban of the statute extends to motion pictures that violate or profane anything sacred to any religion "as that word (religion) is understood by the ordinary reasonable person" (R 151, 154). There are 256 recognized religious sects in the United States (*McCollum* v. *Board of Education*, 333 U. S. 203, 235). Each has some separate doctrines it holds sacred. If the statute is to be applied impartially, as it obviously has not been, the doctrines of all the 256 sects must be protected against condemnation and disparagement. Films advocating armament for defense could be suppressed under the statute because they offend against the Quaker doctrine that war is contrary to the law of God. Films on surgery or medical treatment might not be licensed because repugnant to the tenets of Christian Scientists.[69] Most of the films made in Hollywood could be suppressed as offensive to the religious beliefs of Hindus.[70] A film showing a

[69] The ban of such films is within the realm of probability. The Regents recently ordered the deletion of all examination questions relating to the germ theory of disease because offensive to Christian Scientists. The New York Times, December 12, 1951, page 39, col. 5. The Christian Scientists, to their credit, were among the first to object to that accommodation to their religious views, The New York Times, Dec. 13, 1951, page 68, col. 3.

[70] Most Hollywood features are completely remade in India because the Hindu religion prohibits, among other things, the display of physical passion. (Life Magazine, Dec. 31, 1951, page 51.)

salute to the American flag could be prohibited because that violates the religious sensibilities of Jehovah's Witnesses (*Board of Education* v. *Barnette,* 319 U. S. 624). A film on the Evolution of Man or Paleontology might be suppressed as obnoxious to Literal Fundamentalists. The statute as interpreted would justify the prohibition of pictures showing life insurance, lightning rods (anathema to the Brethren in Christ and Mennonites because they indicate a distrust of Divine Providence),[71] cooked foods,[72] burial of the dead,[72] jewelry,[73] tobacco,[74] shaving.[75] The censors would not be justified in ignoring the religious convictions of any particular group on the ground that it is a minority, for every religious group in the United States in a minority.[76] Under the statute as interpreted, any film based on the tenets of a religious group could be prohibited for the beliefs of the 256 sects in the United States are in conflict. The orthodoxy of one group is the heresy of another, or as Prof. H. W. Janson put it, "one man's sacred cow is another's sacrilege."

The possibilities of abuse inherent in the statute renders it void in its entirety. "It is settled" as Mr. Justice

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[71] Louis R. Binder, Modern Religious Cults and Society, page 130; Elmer T. Clark, The Small Sects of America, page 212.

[72] Forbidden to Doukhobors, Louis R. Binder, *supra,* pages 148-149.

[73] Opposed by members of the United Pentecostal Church, Elmer Clark, The Small Sects of America, page 212.

[74] Offensive to members of The Church of Nazarene, Frank S. Mead, Handbook of Denominations in the United States, page 58.

[75] Forbidden by the Church of the House of David, Mead, *supra,* page 97.

[76] The only religious majority in the United States is the non-church goer. The churches and religious groups *claim* a total membership of only 77,386,166. (Statistical Abstract of the United States, 1951, page 27.) It has been suggested that even the non-church goers fall into minority groups, depending on the churches they are staying away from. Clyde Simmons, Sources and Limits of Religious Freedom, 41 Illinois L. R. 53, 71.

Reed said in *Winters* v. *New York*, 333 U. S. 507, 509, "that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment. Stromberg v. People of the State of California, 283 U. S. 359, 369; Herndon v. Lowry, 301 U. S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such statute's inclusion of prohibtiions against expressions protected by the principle of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press." See also, *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harvard L. R. 1208, 1209-1210.

POINT III

The statute violates the constitutional guaranty of separate church and state.

The Court of Appeals held that the purpose of the statute under consideration is to bar a "visual caricature of religious beliefs held sacred by one sect or another" (R 154). The censor, in applying the statute, must determine that a belief is a religious one, that it is held sacred by a sect, and that the film under consideration caricatures the belief. It is thus impossible to enforce the law without making a religious judgment and without adopting some specific religious dogma as a criterion. In the instant case, the Regents determined that "The Miracle" is sacrilegious because it ridicules the Divine Birth of Jesus (R 55). The Gospel according to St. Matthew, chap. I, 18-25, is cited as authority that the concept is sacred (R 55). The scriptural passages referring to the nativity of Jesus were thus made a standard for official action, and a religious dogma was made the basis for government censorship.

Any state law requiring a government official to pass on substantive matters of religion is a law respecting the establishment of a religion and contravenes the First and Fourteenth Amendments. *Cantwell* v. *Connecticut*, 310 U. S. 296, *Kunz* v. *New York*, 340 U. S. 290. As Mr. Justice Frankfurter observed, "It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong." *Board of Education* v. *Barnette*, 319 U. S. 624, 654 (dissenting opinion).

The law struck down in *Cantwell* v. *Connecticut*, *supra*, required persons soliciting funds for a religious cause to secure a permit from the state Public Welfare Council. Mr. Justice Roberts, writing for a unanimous court, said (p. 305):

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."

In the instant case, as in the *Cantwell* case, the statute authorizes public officers to pass judgment on matters of religion, to refuse a license on religious grounds, and to suppress religious opinions that offend them. See also *Kunz* v. *New York*, 340 U. S. 290, 293.

"The 'establishment of religion' clause of the First Amendment," Mr. Justice Black wrote in *Everson* v. *Board of Education*, 330 U. S. 1, 15, "means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another* • • • No person can be punished for entertaining or professing religious beliefs or disbeliefs • • • Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State' " (emphasis supplied). See also, *McCollum* v. *Board of Education*, 333 U. S. 203, 210-211.

Clearly the statute under consideration if intended as the Appellees say, to prevent offenses against religion, was a law to "*aid all religions*" and therefore directly within the ban of the First Amendment. The fact that the section purports to protect all faiths against sacrilege does not vindicate it. The same point was urged and rejected in the *McCollum* case *supra*.

The Regents concede that any construction of the term sacrilegious denoting a support of the views of one religious sect over the views of others would be inconsistent with the constitutional mandate that Church and State be kept separate. A preference was indicated in this case. Only a group within the Roman Catholic Church found "The Miracle" sacrilegious. Leaders and ministers of Episcopal, Presbyterian, Congregational, Unitarian, Evangelical and Reformed Churches found the film religious (R 96-109, Exhibits 6-55). All Protestant ministers who expressed themselves publicly, and there were a large number, found that the film was not sacrilegious (R 160). In declaring "The Miracle" sacrilegious, the Regents thus were adopting and enforcing the opinion of one segment of a religious group as opposed to the opinions of all others.

The intent of the Constitutional Amendment forbidding the establishment of a religion was to keep religion outside the scope of government activity. The State policy of non-interference in religious matters is a measure of political expedience. With a citizenry marked by wide religious and denominational differences, any policy other than absolute neutrality would lead to conflict. *Davis* v. *Beason*, 133 U. S. 333, 342; *Reynolds* v. *United States*, 98 U. S. 145, 162-164; *Everson* v. *Board of Education*, 330 U. S. 1, 8-15.

The effect of the Regents' ban of "The Miracle" was to impose the religious views of a minority upon all the citizens of the state. The intense resentment of the members of the other religious groups in the state was the natural, foreseeable consequence of any such intervention by the government in a matter relating to religion.

POINT IV

The statute violates the constitutional guaranty of freedom of religion.

Freedom of religion, guaranteed by the Constitution, is not limited to church activities, or to utterances from the pulpit. It extends to and protects religious communications wherever and however made. Religious utterances on street corners (*Kunz* v. *New York*, 340 U. S. 290, 293), in pamphlets (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 106), on phonograph records (*Cantwell* v. *Connecticut*, 310 U. S. 296, 301; *Douglas* v. *Jeanette*, 319 U. S. 157, 167), and over loud speaker systems (*Saia* v. *New York*, 334 U. S. 558, 559),[77] all receive the same protection afforded sermons

[77] The "burial" of the *Saia* case by the decision in *Kovacs* v. *Cooper*, 336 U. S. 77, does not affect the validity of the principle for which the case is cited.

preached in a place of worship. No conceivable reason exists for the denial of that protection to religious utterances in talking pictures.[78]

The prevailing opinion in the court below suggests that as motion pictures are exhibited for commercial gain they may not be considered religious communications (R 154, 155, 156). The fact that payment is received does not, of course, change the nature of the utterance, nor deprive it of its constitutional protection. "If it did, then the passing of the collection plate in church would make the church service a commercial project." (Mr. Justice Douglas, in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111). Any such criteria would prove fatal to the existing churches.

The constitutional guaranty of freedom of religion extends to statements concerning religion, whether of belief or dissent, and whether of faith or protest. Statement of belief in one religion indicates disbelief in or disavowal of all others. Each religious group proclaims its followers the only "true believers" and brands all others as infidel, heathen, heretic, idolatrous, bigoted, etc. It is impossible to state at what point proselytizing ends and abuse of other religious beliefs (or sacrilege, as the Regents define the word) begins. Whether a statement is religious or sacrilegious obviously depends on the beliefs of the person rendering judgment.[79] To justify the condemnation of a

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[78] The majority opinion below states, "Religious presentations, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law, sec. 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or anti-religious sentiment he chooses through a proper use of the films" (R 153-154). The exemption of films intended solely for religious purposes from the requirement of a *license* does not afford them any protection at all. Religious films are issued *permits*, as distinguished from licenses, N. Y. Education Law 123(3). But permits are revocable without a hearing, N. Y. Education Law § 125; and the Regents have provided by Regulation (§ 244) that no picture shall receive a *permit* if sacrilegious.

[79] It will be remembered that Christ was accused of blasphemy, The Gospel according to St. Matthew, 23:65.

communication on the ground that it is sacrilegious is very like Cotton Mather's justification of the punishment of dissenters: "To *persecute* is to punish an *innocent* but a heretic is a culpable and damnable person." (Cotton Mather, The Bloody Tenet Washed and Made White, Ch. XLV.)

The fact that a statement of disbelief is insulting or offensive to those who hold a doctrine sacred cannot justify restraint of the expression. *Kunz* v. *New York*, 340 U. S. 290, 294; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116. Communications may not be repressed merely because they offend the sensibilities of a religious group, no matter how large. Phonograph records denouncing the Roman Catholic Church as "an instrument of Satan" played in the streets in a predominantly Catholic neighborhood were held by this court to be utterances entitled to the protection of the Constitution (*Cantwell* v. *Connecticut*, 310 U. S. 296, 309). This Court afforded the same protection to a speech delivered on the public streets attacking Jews as "Christ-killers", and the Pope as "the Anti-Christ" (*Kunz* v. *New York*, 340 U. S. 290, 296); to pamphlets assaulting the established churches (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 116); to phonograph records played to Roman Catholics on Palm Sunday that described the Catholic Church as a "snare" and a "racket" (*Douglas* v. *Jeanette*, 319 U. S. 157, 167-168); to books ridiculing the religious uses of holy-water, votive candles, and the doctrine of purgatory (*Douglas* v. *Jeanette*, *supra*, p. 172).[80] (See also *State* v. *Klapprott*, 127 N. J. L. 395.) As Mr. Justice Roberts wrote, in *Cantwell* v. *Connecticut*, 310 U. S. 296, 310:

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[80] "In considering abuse of freedom by provocative utterances it is necessary to observe that the law is more tolerant of discussion than are most individuals or communities," Mr. Justice Jackson, dissenting opinion in *Terminiello* v. *Chicago*, 337 U. S. 1, 32.

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

"The Miracle" was religious in intent. But even if the Regents' interpretation of the film is accepted, the "caricature" of religious dogma does not justify the suppression of the picture. The alleged derision of sacred doctrine in "The Miracle" is not direct; it is said to be implied by the theme and the use of biblical text. If it did exist, the derision was most subtle,[81] and hardly of the kind to move an audience to violence. As Judge Fuld said, "* * * the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive. Nor is there any evidence of any malicious purpose or intention on the part of the producers of the film to revile or even attack Catholic doctrine or dogma, nor any suggestion of any reasonable likelihood of a breach of the peace resulting from the film's exhibition" (R 167-168).

If books were proscribed for the reasons advanced for the ban of "The Miracle", political progress would have been seriously impeded, and literature, philosophy, and jurisprudence greatly impoverished. The ban would have

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[81] The writer, actors, producer, and Vatican critics, among others, were unaware of it (R 15, 43).

included works of John Milton, Francis Bacon, Jeremy Bentham, Thomas Hobbes, John Locke, John Stuart Mill, Addison and Steele, Oliver Goldsmith, Immanuel Kant, Maimonides, Spinoza, Sterne, Swedenborg, Balzac, Bergson, Cato, Comte, Benedetto Croce, D'Annunzio, Daudet, Defoe, Descartes, Diderot, Dumas (father and son), Grotius, Flaubert, De la Fontaine, Anatole France, Edward Gibbon, Voltaire, Heine, Hugo, David Hume, Maeterlinck, Montaigne, Montesquieu, Pascal, Racine, Renan, Rousseau, Stendahl, Zola, to mention but a very few of the classics proscribed by the Index Librorum Prohibitorum (1940) on the ground that they violate or profane sacred belief.[52]

We cannot gauge the damage caused by the censorship of motion pictures. But we may be certain that the great promise of the medium will not be fulfilled until it is free of the restraints of the licensing statutes here challenged.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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March, 1952.

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[52] The writings banned under the General Index for the same reason are legion.

Appendix

New York Education Law

Article 3, Part I—General Provisions

§ 101—Education department, regents of the university

There shall continue to be in the state government an education department * * * The head of the department shall continue to be the regents of The University of the State of New York, who shall appoint, and at pleasure may remove, the commissioner of education. The commissioner shall continue to be the chief administrative officer of the department * * *.

Article 3, Part II—Motion Picture Division

§ 120. Motion picture division continued; organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

§ 122. Licenses

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

§ 123. Permits

1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for

educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees; provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

§ 125. Permits revocable

Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

§ 126. Fees

The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

§ 127. Applications

No license or permit shall be issued for any film unless and until application therefor shall be made in writing in

the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

§ 128. Licenses and permits void

Any license or permit issued upon a false or misleading affidavit or application shall be wholly void ab initio. Any change or alteration in a film after license or permit, except the elimination of a part or except upon written direction of the director or authorized officer of such division, shall be a violation of this article and shall also make immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall per se revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

§ 129. Unlawful use or exhibition

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

§ 131. Penalty

A violation of any provision of part two of this article shall be a misdemeanor.

§ 132. Enforcement; rules and regulations

The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.

Rules and Regulations for Review and Licensing of Motion Pictures, issued by the Board of Regents of the University of the State of New York

Motion Pictures

The Motion Picture Commission was originally created by an act of the Legislature known as chapter 715 of the Laws of 1921. This commission functioned until January 1, 1927, when under the provisions of the State Departments Law the activities of this commission were transferred to the State Education Department. A Motion Picture Division was created and the Board of Regents

was authorized to assign to such Division all the powers, duties and functions of the aforesaid commission. . . . (The University of the State of New York Education Department, Handbook No. 38, Page 3.)

Regents Rules

§ 237 *Examination of films.* 1 All films to be released within the State of New York on or after January 1, 1927, shall be presented for examination to the Motion Picture Division at such times and places as it may designate. The applicant shall fill out a blank furnished by the Division, which shall contain the name and address of the applicant and be a statement or an affidavit as the Director of the Division may require.

2 The application shall contain a statement of the title of the film, the manufacturer and the exchange handling the film, the number of reels and the total length of the picture, and a statement of the number of duplicates or prints of the film to be used in the State of New York. It shall also contain a brief description of the film, with a classification as to whether it is a comedy or drama, the date of manufacture, the date of release and the names of the leading characters in the film. There shall also be embodied in the application an agreement that the duplicates applied for are exact copies of the original film and that all eliminations or changes directed by the Division will be made before the film is released in the State of New York.

3 Applications for licenses for films in which all or a part thereof is to be exhibited in conjunction with any mechanical device for the reproduction of sound or language, or by the use of persons for the utterance of language,

must be accompanied by an exact transcription of such language. When the dialogue used in conjunction with such films is in a foreign language, an exact transcription into English must be submitted with the application.

4 Each application for examination shall be filed with the Division at its office in the city of New York, or elsewhere, if required, at least one week before the date fixed for the release.

5 Each application shall be accompanied by a money order or certified check drawn to the order of the Department, Motion Picture Division, for the amount of the fee required by law to be paid.

6 At the time of making the application for a license or permit, the Division will give to each film, and to each duplicate or print thereof, a serial number which shall be included in the identification matter required to be exhibited with the film as provided by these rules.

7 All banners, posters or other advertising matter used in connection with the film, when requested by the Director, shall be submitted to the Division for examination.

(Handbook 38, *supra*, p. 12-14.)

§ 242 *Unlawful use or exhibition.* It shall be unlawful to exhibit any film in the State of New York unless there shall be exhibited with the same as required by these rules and regulations the seal and serial number accompanied by the identification words showing the granting of a permit or license, and it shall be unlawful to detach and exhibit a portion of any film for which a license or permit has been granted, without the exhibition of the seal, serial number

and words accompanying the same. It shall be unlawful to use any portion of the leader upon a film other than the one for which it was issued.

(Handbook 38, *supra*, p. 21-22.)

§ 244 *License or permit to be refused in certain cases.* No motion picture shall be licensed *or a permit* granted for its exhibition within the State of New York the whole or any part of which is obscene, indecedent, immoral, inhuman, sacrilegious, or of such a character that its exhibition would tend to corrupt morals or incite to crime.

(Handbook 38, *supra*, p. 23.)

STANDARDS OF THE MOTION PICTURE DIVISION

As Fixed By Law

No motion picture will be licensed or a permit granted for its exhibition within the State of New York, which may be classified, or any part thereof, as *obscene, indecent, immoral, inhuman, sacrilegious, or which is of such a character that its exhibition would tend to corrupt morals or incite to crime.*

(Handbook 38, *supra*, p. 25.)